



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

CATHERINE G. O'NEILL and  
VINCENT J. O'NEILL,

Plaintiffs,

v.

**C.A. No. 2197-N**

TOWN OF MIDDLETOWN, a Delaware  
municipal corporation; MAYOR &  
COUNCIL OF MIDDLETOWN, the  
governing body of the Town of  
Middletown; 301 WEST VENTURES,  
LLC, a Delaware limited liability company;  
KOHL, L.L.C., a Delaware limited liability  
company; WAL-MART STORES, INC.,  
a Delaware Corporation; WAL-MART  
STORES EAST LP, a Delaware limited  
partnership; VICTOR P. KOHL, JR.; and  
BENJAMIN G. KOHL,

Defendants.

**MEMORANDUM OPINION**

Date Submitted: July 5, 2006

Date Decided: July 10, 2006

Richard L. Abbott, Esquire of Abbott Law Firm, Hockessin, Delaware, Attorney for Plaintiff.

Joseph Scott Shannon, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware, Attorney for Defendants Town of Middletown and Mayor & Council of Middletown.

William E. Manning, Esquire and Richard A. Forsten, Esquire of Buchanan Ingersoll & Rooney PC, Wilmington, Delaware, Attorneys for Defendant 301 West Ventures, LLC.

Chad M. Shandler, Esquire of Richards, Layton & Finger, Wilmington, Delaware, Attorney for Defendants Kohl, L.L.C., Victor P. Kohl, Jr., and Benjamin G. Kohl.

Margaret F. England, Esquire and Karen L. Turner, Esquire of Eckert Seamans Cherin & Mellott, Wilmington, Delaware, and Donald A. Rae, Esquire and Robert Johnson, Esquire of McGuire Woods LLP, Baltimore, Maryland, Attorneys for Defendants Wal-Mart Stores, Inc. and Wal-Mart Stores East LP.

NOBLE, Vice Chancellor

Plaintiffs Catherine G. O'Neill and Vincent J. O'Neill again challenge an effort by the Town of Middletown, Delaware to rezone a 98-acre parcel (the "Parcel") on U.S. Route 301 from Industrial to Commercial. The Town rezoned the Parcel in 2005, but that rezoning was set aside because it did not comply with the Town's Comprehensive Plan.<sup>1</sup> The Town revised its Comprehensive Plan to allow for commercial development of the Parcel and again rezoned it to Commercial.<sup>2</sup> The Plaintiffs raise a number of arguments against the rezoning, the most serious of which is an alleged failure by the members of the Town Council to provide sufficient reasons for their action. The parties have filed cross-motions for summary judgment; this memorandum opinion resolves those motions.<sup>3</sup>

## **I. BACKGROUND**

When this saga began, the Parcel was owned by Defendant Kohl, L.L.C. ("Kohl"). It has been subdivided and is now owned by Defendant Wal-Mart Stores East, LP ("Wal-Mart"), Defendants Victor P. Kohl, Jr. and Benjamin G. Kohl (the "Kohls"), and Defendant 301 West Ventures, LLC ("Ventures").<sup>4</sup>

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<sup>1</sup> *O'Neill v. Town of Middletown (O'Neill I)*, 2006 WL 205071 (Del. Ch. Jan. 18, 2006).

<sup>2</sup> The Plaintiffs did not contest the amendment of the Comprehensive Plan and have not argued that the rezoning of the Parcel is not consistent with the Comprehensive Plan.

<sup>3</sup> The record before the Court consists of exhibits submitted by the Plaintiffs with their two briefs (referred to as "PX\_\_") and by the Defendants as an appendix to their answering brief (referred to as "DX\_\_").

<sup>4</sup> The municipal defendants are the Town of Middletown and the Mayor & Council of Middletown. They are sometimes referred to, collectively, as the "Town."

Following this Court's decision on January 18, 2006, to invalidate the first rezoning of the Parcel, the Town, which had already revised its Comprehensive Plan to accommodate commercial use of the Parcel, promptly began again the process to rezone the Parcel from Manufacturing-Industrial (M-I) to Employment/Regional Retail (C-3). An ordinance was introduced on February 6, 2006, and referred to the Town's Planning and Zoning Commission (the "Commission"). Plaintiffs' counsel opposed the rezoning before the Commission at its hearing on March 16, 2006, but the Commission recommended, unanimously but without any explanation of its reasons, that the rezoning be approved.<sup>5</sup>

The Town Council considered the rezoning application on April 3, 2006. Plaintiffs' counsel again appeared in opposition. He voiced concerns about potential traffic impact and adverse environmental consequences (primarily with respect to groundwater recharge). The four members of the Town Council voted unanimously in favor of the application.<sup>6</sup> They offered no reasons at that time for their actions, and the hearing on the rezoning was closed. Shortly thereafter, an attorney for a party supporting the rezoning implored the members of the Town Council to explain their reasons:<sup>7</sup>

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<sup>5</sup> PX 7.

<sup>6</sup> The Mayor signed the rezoning ordinance the same day, April 3, 2006. PX11.

<sup>7</sup> The ensuing transcript (PX 10 & 24) of a portion of the tape recording of the meeting was prepared under the supervision of Plaintiffs' counsel. The Defendants have not challenged its accuracy. All of the quoted portions of the meeting occurred after conclusion of the Town Council's consideration of the Parcel's rezoning and after the Town Council had gone on to

**Mr. Forsten:** Can I just address the Mayor & Council briefly on the rezoning?

**Mayor Branner:** Yes.

**Mr. Forsten:** You just all approved, which I appreciate by the way, I wonder if for the record the Mayor and members of Council could simply state the reasons for their vote so that's it clear and nobody has questions later on down the line as to why...

**Mayor Branner:** Sure

**Mr. Forsten:** you all approved.

**Mayor Branner:** If that would be a benefit; that's fine. No problem at all for the record. Mr. McGhee?

**Councilman McGhee:** Because most of the residents, I voted for...affirmative because most of the residents that I talked to would like to have a Wal-Mart. So that's why I voted for it...to rezone.

**Mayor Branner:** Mr. Reynolds?

**Councilman Reynolds:** On the same lines as Mr. McGhee, during the last campaign everyone we talked to...that I talked to...first question was "when we getting a Wal-Mart" – "we need one" and that's the reason why I voted for it.

**Mayor Branner:** Alright. I didn't get to vote, but I'll certain state my reasons, but go ahead. I didn't get to vote. Kath?

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other matters. Portions of the recording were inaudible, and it is conceivable that a more skilled transcription might have been more informative. The Defendants have not undertaken that effort, and the record before the Court in this expedited action is what it is.

It is worth noting that without Counsel's effort there would have been no explanation at all of why the council members voted as they did. Counsel's suggestion, *see infra*, page 4, that the recently adopted Comprehensive Plan might provide a useful starting point was reasonable. Counsel could not have foreseen that his suggestion would have been ignored or cavalierly rejected.

**Councilwoman Kelly:** Okay, the reason that I voted was not mainly because of Wal-Mart or anything else, I mean you can put your Target or anything else there. But my constituents almost to a “T” want some place to shop, and they’re tired of hearing...First of all they’re tired of hearing about Patricia Potts and O’Neill, whoever they are. I’ve never seen or met them. They’re the ones who filed the lawsuit. They’ve never been in this chamber as far as I know, and they are holding you all hostage, and that’s why I voted “yes.”

**Mayor Branner:** Okay? Mr. Faulkner?

**Mr. Forsten:** I wonder if the consistency with the Comprehensive Plan, especially the revised Comprehensive Plan, was also a reason why members of Council voted the way they did...

\* \* \* \*

**Councilman Faulkner:** And quite frankly, you’re not going to put words in my mouth.

\* \* \* \*

I have three people a week ask me when we’re going to get a major retailer in here...

\* \* \* \*

And you know, we don’t have the place to put it. We stopped it on another piece of property on the other side of Town because that’s not what we had designed to put there. You know, the reason we have so much Manufacturing Industrial on this side is because the State wanted us to that to try to attract the Chip plant, which never came to fruition. And you know, everybody talks about jobs. Well this is jobs whether it’s Wal-Mart, whether its Target, whatever it is. It’s jobs, and it’s not just the jobs the new stores will create. It creates other jobs that serve those things, and jobs in restaurants the people that are working there go eat at. Jobs all over the Town. That’s my reason.<sup>8</sup>

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<sup>8</sup> PX 24.

The minutes of the Town Council's rezoning hearing, prepared after the meeting, reflect the following comments by members of the Town Council in support of their votes for the rezoning:

Robert McGhee: Voted for the rezoning because most of the residents he spoke with want a Wal-Mart.

James Reynolds: Voted for the rezoning and stated that during the last campaign, most of the residents he spoke with asked when the Town would get a Wal-Mart.

Catherine Kelly: Voted for the rezoning because her constituents want someplace to shop. They constantly ask when the town will have a retailer.

Jason Faulkner: Voted for the rezoning because he has at least 3 people a week asking when the town will get a major retailer. It was stopped on the other side of town because that parcel had not been designed for that type of retail. The reason the Town has so much manufacturing-industrial zoning on the west side of Town is because the State wanted the town to do that to try to attract the chip plant, which never came to fruition. This will also bring jobs.<sup>9</sup>

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<sup>9</sup> DX C. The minutes also memorialized the following:

Richard Forsten, attorney for the owner of the property, presented the rezoning request. Mr. Forsten stated in the fall of 2004, Council unanimously approved the rezoning request. There was an issue of conformance with the Town's Comprehensive Plan. The State Planning Office, the Town and the owner all felt the rezoning complied; however, the Court of Chancery disagreed. The Comprehensive Plan has since been updated and the rezoning conforms to the Comprehensive Plan. Therefore, the request is being presented again for approval. A Wal-Mart is proposed to be constructed on part of the property. Site plan approval will be presented at a later date.

Mayor Branner stated Planning and Zoning unanimously recommended approval for the rezoning.

Richard Abbott, attorney, stated the Planning Commission didn't issue any specific recommendation as required by the Town's Zoning Code – no comments were made at all. He also stated no comments were made on traffic and road capacity. DelDOT assured that improvements would be made. The biggest improvements to be made are the dualization of 301 and the Bunker Hill Road/301 intersection – more than \$26,000,000 in road improvements is needed to provide adequate levels of service. DelDOT doesn't have any money until

With the rezoning apparently accomplished, the Town has moved forward with the planning process for the project on the lands now owned by Wal-Mart.

## **II. CONTENTIONS**

The Plaintiffs assert that the rezoning was invalid for several reasons.<sup>10</sup> First, they contend that, as a substantive matter, the use of the Parcel for commercial purposes will cause serious traffic safety problems and will also result in the degradation of a major groundwater recharge area. Second, they argue that the Town failed to obtain favorable approval of the proposed land use applications

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July 1, 2006. Mr. Abbott suggested delaying the approval for the rezoning until the necessary improvements can be installed.

Mr. Bruette commented that M-I space has been diminished – what is the plan to balance M-I zoning for M-I use? Mayor Branner said M-I use is across the road and on Industrial Drive. It's been M-I for about 17 years. It's been marketed for 17 years with DEDO and nothing for large industrial employers has materialized. The Town has the ability to change the zoning if a large industrial employer is interested. If there was a major industrial user, it wouldn't necessarily decrease the traffic.

There were general comments from residents both for and against the rezoning.

Mayor Branner stated a major traffic impact study is being done to cover the west side. The study will give recommendations in stages. The money is there for Bunker Hill Road upgrades and the upgrades to Levels Road. In addition, certificates of occupancy will not be issued until the signalization is in place at the entrance to the facility. There will also be a signalized intersection at the Auto Mall.

Rt. 299 will be upgraded to include roundabouts and signalization. Silver Lake Road will have a 4-way intersection that will go back to the Pederson property and tie-in to Clever Farm Road. It will be a convenience road that will provide a parallel road to go down Lake Street, across Broad to the railroad tracks. There might also be an overpass over the railroad tracks.

<sup>10</sup> The Plaintiffs also challenge the ongoing planning process. Because that process is not completed, it provides no question that is ripe for judicial review.



from the Office of State Planning Coordination (“OSPC”) under the Preliminary Land Use Service (“PLUS”) provisions of 29 *Del.C.* § 9204. Third, they attack the rezoning because the members of the Town Council either made no record or made an insufficient record of their reasons for approving the rezoning. Finally, the Middletown Zoning Code (at Section 12 A) requires the Commission to “report its findings and recommendations to the Town Council” before any rezoning may be approved. Here, the Commission simply voted to recommend approval of the rezoning. Thus, although it may have made a recommendation, the Commission, according to the Plaintiffs, failed to “report its findings,” and, without the benefit of the Commission’s findings, the Town Council should not have proceeded to consider the rezoning application.<sup>11</sup>

### **III. ANALYSIS**

#### *A. The Standard for Summary Judgment*

A party may obtain summary judgment if it is able to demonstrate that there are no material facts in dispute and that it is entitled to judgment as a matter of law.<sup>12</sup> The filing of cross-motions does not relieve the Court of its duty to consider

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<sup>11</sup> The Defendants have not challenged the standing of the Plaintiffs to bring this action. The Court’s understanding of the Plaintiffs’ entitlement to pursue this litigation is consistent with its views set forth in *O’Neill I.*

<sup>12</sup> CT. CH. R. 56(c). *See, e.g., Barry v. Town of Dewey Beach*, 2006 WL 1668352, at \*3 (Del. Ch. June 8, 2006).

whether material facts are disputed. On the record before the Court, however, there are no material facts in dispute.<sup>13</sup>

B. *Judicial Review of Zoning Decisions*

In *O'Neill I*, the Court set aside the Town's rezoning of the Parcel<sup>14</sup> because of its inconsistency with the Town's Comprehensive Plan. The Town, while *O'Neill I* was pending, revised its Comprehensive Plan in November 2005.<sup>15</sup> After the Court's decision which, in effect, returned the Parcel to M-I zoning, the Town proposed a new ordinance to rezone the Parcel to C-3.<sup>16</sup> Although the rezoning ordinance challenged here must be assessed on its own merits, the Town's actions are fairly viewed against the background of both *O'Neill I* and the Town's revision of its Comprehensive Plan.

Judicial review of zoning decisions is generally highly deferential to the judgment of those individuals chosen by the political process to exercise the zoning power to protect and to enhance the public health, safety, and welfare.

Rezoning decisions are presumptively valid and will not be set aside unless clearly shown to be arbitrary and capricious. The party challenging a rezoning has the burden of rebutting the presumption of validity and showing that the rezoning is arbitrary and capricious. If

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<sup>13</sup> The Plaintiffs have argued, although unpersuasively, that factual issues exist, thereby precluding the Court's reliance on Court of Chancery Rule 56(h).

<sup>14</sup> The Parcel had been rezoned to C-3 and to Office Park (OP).

<sup>15</sup> References to the Town's Comprehensive Plan are to the November 5 (*i.e.*, the current) version.

<sup>16</sup> The order implementing the Court's decision invalidated the earlier rezoning. There was no remand, as such, for further consideration.

the reasonableness of the zoning change is fairly debatable, the judgment of the [zoning authority] must prevail.<sup>17</sup>

In performing the “legislative” function of adopting a rezoning ordinance, “the only ‘burden’ the [zoning authority has] . . . is to determine if the rezoning is in the interests of health, safety and welfare of the community.”<sup>18</sup>

Despite the deference accorded to a zoning authority, the presumption in favor of the regularity of its actions is generally dependent upon its setting forth reasons supporting the exercise of its discretion (or, in narrow circumstances, otherwise providing a record from which the Court can clearly ascertain its reasons) in order to allow for the proper, although limited, judicial review available to those disappointed by the zoning authority’s actions.<sup>19</sup>

[The zoning authority] need not draft a detailed statement of findings of fact and conclusions of law in order to explain a given zoning regulation. However, insofar as [the zoning authority] simply ‘creates a record’ and relies upon that record to justify its decision, the record must prove to be an adequate substitute for a more formal explanation. Thus, [the zoning authority’s] reasons must be clear from the record. If several possible explanations for a given decision appear on the

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<sup>17</sup> *Citizens’ Coalition, Inc. v. Sussex County Council*, 2004 WL 1043726, at \*2 (Del. Ch. Apr. 30, 2004)(citations omitted), *aff’d*, 860 A.2d 809 (Del. 2004) (TABLE); *see also Shevock v. Orchards Homeowners Ass’n, Inc.*, 621 A.2d 346, 349 (Del. 1993) (holding that rezoning not in conformance with the law is arbitrary and capricious); *Deskis v. County Council of Sussex County*, 2001 WL 1641338, at \*4 (Del. Ch. Dec. 7, 2001) (“The Court’s role in reviewing a zoning decision is limited to reviewing the record to determine whether the decision is supported by substantial evidence and, if so, whether the decision was arbitrary and capricious.”).

<sup>18</sup> *Lynch v. City of Rehoboth Beach*, 2005 WL 2000774, at \*3 (Del. Ch. Aug. 16, 2005), *aff’d*, 894 A.2d 407 (Del. 2006) (TABLE).

<sup>19</sup> *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986).

record, the reviewing court must not be left to speculate as to which evidential basis [the zoning authority] favored.<sup>20</sup>

[Thus], it is not enough that the [zoning authority's] decision appears reasonable or that there was evidence to support those who decided to vote in favor of the rezoning application. The record must establish the basis for the [zoning authority's] decision.<sup>21</sup>

There is no specific pathway that the zoning authority must follow in order to satisfy its obligation to provide a reviewing court the reasons for its decision.<sup>22</sup>

The individual members of the zoning authority may set forth their reasons. The resolution adopting the zoning ordinance may have attached to it a set of reasons. The ordinance authorizing the rezoning may itself contain sufficient reasons. Also, the record, especially when there is little or no challenge, may be clear enough to provide the Court with a firm understanding, without requiring it to speculate, of the rationale for the zoning authority's decision.

With these principles in mind, the Court now turns to the reasons stated by the members of the Town Council.<sup>23</sup> Because the ordinance purporting to rezone the Parcel does not contain within it, or by incorporation, reasoning which the

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<sup>20</sup> *New Castle County Council v. BC Dev. Assocs.*, 567 A.2d 1271, 1276 (Del. 1989).

<sup>21</sup> *Country Preservation Ass'n of Kent County v. Kent County Levy Court*, 1991 WL 153063, at \*1 (Del. Ch. July 26, 1991).

<sup>22</sup> *Blake v. Sussex County Council*, 1997 WL 525844, at \*6 (Del. Ch. July 15, 1997) (“[The zoning authority] is not required to follow a particular formula but rather must in some way ensure that a reviewing court may test the decision of the [zoning authority] against the constitutional and statutory mandate [governing the exercise of the police power].”).

<sup>23</sup> The Court will address the reasons given by three council members. With respect to two, the reasons set forth in the minutes and the reasons set forth in the transcript are consistent. With respect to the third council member, the transcript contains a reason not appearing in the minutes.

Court can review, the statements of the council members become the only source, other than the bare record itself, available for the Court to inspect.

C. *The Reasoning Expressed to Support the Rezoning*

Two council members each gave substantially the same reason for supporting the rezoning: “most of the residents he spoke with want a Wal-Mart.” That explanation raises two questions: (1) may Council members point exclusively to comments received outside of the public hearing process; and (2) may Council members rely upon a desire for a specific commercial establishment, here a “Wal-Mart,” as a reason sufficiently related to the public health, safety, and welfare?<sup>24</sup> By relying exclusively upon matters outside of the record of this rezoning,<sup>25</sup> the Council members, probably unintentionally, have deprived the Court of the ability to assess how, or, indeed, if, they reached their decision by considering the public record. Whether reviewed under a substantial evidence test or some other formulation of a minimal review standard, a zoning decision in a state such as

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<sup>24</sup> The Defendants point to the Comprehensive Plan as support for the appropriateness of a desire for a “Wal-Mart” as a basis for a land use decision. The Comprehensive Plan (at Section 9.3) recites—in a section dedicated to describing ongoing development in Middletown—that “a one million square-foot retail and office center slated to include a Wal-Mart” is planned for the west side of the Town. This portion of the Comprehensive Plan is descriptive of activity at the time of adoption of the plan. It does not constitute a specific projection or goal of the Comprehensive Plan in the context of the future use of the Parcel.

<sup>25</sup> Indeed, Councilman Reynolds, as reported by the minutes of the meeting, relied exclusively upon comments provided by the residents “during the last campaign.”

Delaware that uses a methodology described as quasi-judicial,<sup>26</sup> such comments do not allow for any kind of rational or uniform judicial review. As noted in *BC Development*, a court sometimes is left with little choice but to overturn a land use decision, not because it is wrong or objectionable in any sense, but simply because the zoning authority “has not permitted the Court to perform its role in the review process, *i.e.*, to form an opinion of the propriety of the [zoning authority’s] action.”<sup>27</sup>

Also problematic is the limitation of the two council members’ reasons to a desire for a Wal-Mart. First, by the time of the rezoning, the Parcel had been subdivided into three tracts and conveyed accordingly. Of the Parcel’s 98 acres, 26 acres were conveyed to Wal-Mart. Only those 26 acres will be used for a Wal-Mart. Thus, Wal-Mart, if that designation is to be treated literally, has no relationship to the balance of the Parcel. The rezoning did not acknowledge the existence of three separate parcels; indeed, the rezoning was for the Parcel as a 98-

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<sup>26</sup> See 3 ARDEN H. RATHKOPF, DAREN A. RATHKOPF, & EDWARD H. ZIEGLER, JR., *THE LAW OF ZONING AND PLANNING* § 40:20 (4th ed. 2004).

<sup>27</sup> *BC Dev. Assocs.*, 567 A.2d at 1276. The Court notes, in passing, that some rough polling assessment of the popularity of a land use decision is a poor substitute for a careful assessment of the record before the zoning authority and may raise concerns of due process. Although perceptions of public support for or opposition to a particular land use issue may inevitably have some role in the process, one hopes that land use decisions are based on something more than popularity contests. This is not to say that members of a zoning authority may not consider their knowledge of community needs and circumstances or what they may have learned from visiting the site; some explication of that knowledge and how it was garnered, however, is generally necessary if it is critical to the outcome.

acre tract.<sup>28</sup> Indeed, the ordinance reflects the lands as still owned by Kohl. By the time of the rezoning, it appears that Kohl owned no portion of the Parcel.

Second, the factual grounds relied upon by the zoning authority and the goals of the rezoning must bear a relationship to the community's health, safety, and welfare. A particular commercial venture—referred to by business name—fails to provide a basis for drawing a connection.<sup>29</sup> It is possible, of course, to interpret the council members' references to "Wal-Mart" as not to Wal-Mart as a particular commercial venture, but as a placeholder for major retail opportunities. Frankly, that is not the better reading because the council members spoke very clearly as to their motivations in voting for the rezoning. Moreover, that is the kind of speculation into the potential reasons for the zoning authority's actions in which the Court should not engage.

The Court next considers the rationale advanced by Councilwoman Kelly in support of her vote. Her comments, following those of Councilmen McGhee and Reynolds, revealed that her concerns were not just for a "Wal-Mart" but were perhaps for a better or broader retail opportunity for the citizens of the Town.<sup>30</sup>

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<sup>28</sup> See DX D.

<sup>29</sup> Although the comparison is not precise, the statements of the council members obviously beg the question of what should a court do if the council members had opposed the rezoning simply because the residents of the community did not want a "Wal-Mart."

<sup>30</sup> Although the Court does not rely upon this, it is a fair reading of the transcript that Councilwoman Kelly contemporaneously understood Councilmen McGhee and Reynolds to have limited their comments to "Wal-Mart" precisely and that she was uneasy with such a limitation and therefore expanded her comments to include other retailers.

Councilwoman Kelly, however, went on and indicated that a need for retail opportunities was not her reason, in fact, for voting for the rezoning. Instead, she chose a reason, one which even the Defendants do not rally to support, which she expressed as follows:

[My constituents are] tired of hearing about Patricia Potts [a plaintiff in *O'Neill I* who has not joined in this action] and O'Neill, whoever they are, I've never seen or met them. They're the ones who filed the lawsuit. They've never been in this chamber as far as I know, and they are holding you all hostage, and that's why I voted "yes."<sup>31</sup>

Perhaps Councilwoman Kelly did not mean what she said, but that again is not the type of speculation which the Court may pursue. Instead, as the transcript clearly indicates, she tied her vote in favor of the rezoning to her frustration, or, more precisely, her perception of her constituents' frustration, with litigation brought by the Plaintiffs. A reason such as that bears no relationship whatsoever to a valid land use decision and, necessarily, renders the ground upon which she exclusively relied arbitrary and capricious.

In sum, three of the four council members who voted in favor of the rezoning gave reasons which, as a matter of law, are insufficient to provide a basis for the Court's review of the rezoning or are insufficient to support a rezoning. Perhaps the fourth council member's reasons were sufficient, but there is no indication that the other three council members whose reasons have been reviewed

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<sup>31</sup> PX 24.



adopted the fourth council member's reasons. As such, even if the fourth council member's reasons are legally sufficient, they cannot be the basis for sustaining the rezoning.<sup>32</sup>

D. *The Record as a Source of Justification*

The Defendants urge that the Court review the record and conclude that the Town Council's reasons for approving the rezoning are clear. In *Tate* and *BC Development*, the procedures for this type of analysis were developed.

[I]nsofar as [the zoning authority] simply "creates a record" and relies upon that record to justify its decision, the record must prove to be an adequate substitute for a more formal explanation. Thus, [the zoning authority's] reasons must be clear from the record. If several possible explanations for a given decision appear on the record, the reviewing court must not be left to speculate as to which evidential basis [the zoning authority] favored.<sup>33</sup>

Under *Tate*, as elaborated upon in *BC Development*, the zoning authority either "creates a record or states on the record its reasons for a zoning change. . . ."<sup>34</sup> This suggests that the reviewing court should look to the record as the source of the zoning authority's reasoning only when the zoning authority has not otherwise stated its reasoning.

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<sup>32</sup> See *Country Preservation Ass'n of Kent County*, 1991 WL 153063, at \*3. Similarly, to the extent that the Mayor may have spoken in favor of the rezoning, he, of course, did not vote (the Mayor votes only if the Council's vote is tied), and no member of Council indicated any reliance on his views.

<sup>33</sup> *BC Dev. Assocs.*, 567 A.2d at 1276.

<sup>34</sup> *Tate*, 503 A.2d at 191.

The Town Council, here, did not fail to provide reasoning. Instead, the Court has concluded that the reasons proffered were insufficient. The task of the Court under the “reviewing the record” prong of *Tate* and *BC Development* is to ascertain the reasoning of the zoning authority; if those reasons are obvious, then the Court can predict with some confidence that, if the zoning authority had done so, it would have set forth the reasoning anticipated by the Court. That, however, is not the work the Defendants ask the Court now to perform. To the contrary, the Defendants want the Court to review the record, divine proper and sufficient reasons to support the rezoning, and then substitute that reasoning for the reasons advanced by the members of the Town Council. In effect, the Defendants implore the Court to tell the Town Council members that they did not mean what they said and that they really intended to say what the Court might consider sufficient. If the Court were to substitute its views for those of the Town Council members, it would go beyond its limited role prescribed by *Tate* and *BC Development*, which establish an approach when the zoning authority fails to state the obvious.<sup>35</sup> Accordingly, the Court should not, and cannot, substitute its views for the reasons given by the members of the Town Council.

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<sup>35</sup> *Cf. DeMaria v. Enfield Planning & Zoning Comm’n*, 271 A.2d 105, 109 (Conn. 1970) (in context of review of quasi-judicial special permit rejection, holding that court could not “go behind” the reasons stated by the authority in an “attempt to search out and speculate upon other reasons which might have influenced some or all of the members to reach the [authority’s] final collective decision”).

Even if the Court concluded that it could look at the record and then substitute the “real” reasons prompting the members of Council, the narrow authority accorded by *Tate* and *BC Development* would not allow the Court to reject the Plaintiffs’ challenges. The record does not provide a basis for determining, clearly and without speculation, the “real” reasons of the Council members. The record of the rezoning is in conflict. Counsel for the Plaintiffs appeared and raised apparently non-frivolous questions regarding traffic safety and environmental consequences. One could assume that, by voting for the rezoning, the Council members did not view those concerns as significant. Or, one could assume that they did not believe that those concerns mattered because the rezoning simply brought the zoning map into conformance with the Comprehensive Plan. Or, the Town Council members may have believed that the traffic concerns, for example, were significant but the planning process would adequately address them. One simply cannot tell from this record.<sup>36</sup>

One additional possibility for sustaining the Council’s decision must be considered. The Comprehensive Plan now designates the Parcel’s future as

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<sup>36</sup> The difficulty may be traced to the Town Council’s perception that it was performing a purely ministerial function following adoption of the Comprehensive Plan. The problem of *O’Neill I* had been solved and, thus, perhaps the Council believed, its scope of responsibility had been narrowed. This rezoning, however, was a separate proceeding involving a new ordinance, and the Comprehensive Plan revisions did not deprive the Town Council of all discretion. There is no express indication in the record as to how the members of the Town Council viewed the traffic and environmental concerns advanced by the Plaintiffs.

“commercial.”<sup>37</sup> By 22 *Del.C.* § 702(c), the Town is required to rezone lands within eighteen months of adoption of a revised comprehensive plan to a classification consistent with the revised comprehensive plan.<sup>38</sup> Of course, during that period, the Town retains the authority to revise yet again the Comprehensive Plan. The Comprehensive Plan, however, does not expressly mandate a particular rezoning classification for the Parcel.<sup>39</sup>

The Defendants argue that the rezoning of the Parcel simply carried out the statutory mandate that zoning be consistent with the Comprehensive Plan. All agree that rezoning of the Parcel to C-3 is consistent with the Comprehensive Plan, but, as the Plaintiffs point out, there are other commercial zoning classifications in the Town—C-2 (downtown commercial) and OP (office park), which may also be consistent with the Comprehensive Plan. In short, rezoning of the Parcel to C-3 was not the only option available to the Town Council in satisfying its (arguably

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<sup>37</sup> See Comprehensive Plan, Map 6.

<sup>38</sup> “The comprehensive plan shall be the basis for the development of zoning regulations . . . . Should a jurisdiction exercise its authority to establish municipal zoning regulations . . . , it shall, within 18 months of the adoption of a comprehensive development plan or revision thereof, amend its official zoning map to rezone all lands within the municipality in accordance with the uses of land provided for in the comprehensive development plan.” 22 *Del.C.* § 702(c).

<sup>39</sup> The Defendants have pointed to Map 7 (DX I) of the Comprehensive Plan, entitled “Zoning.” That map depicts the Parcel as C-3. It, however, reflected the zoning in effect at the time of the revision of the Comprehensive Plan. It does not purport to define future uses and, if it did, it would largely render meaningless Map 6 (DX H) of the Comprehensive Plan which shows prospective uses of lands in the Town. Map 6 proposes that the Parcel’s use be “commercial.”

not-yet-matured) obligation to rezone the Parcel in accordance with the revised Comprehensive Plan.<sup>40</sup>

Defendants' reliance on the Comprehensive Plan not only suffers from the fact that the Comprehensive Plan does not, of itself, require rezoning to C-3, but it

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<sup>40</sup> Because the Parcel must be rezoned to commercial, if other commercial zoning categories within the Town could be excluded, then the rezoning to C-3 *might* be sustainable through the process of elimination. At the outset, it should be noted that the Town is under no immediate duty to rezone the Parcel for almost another year. Moreover, the question is not, however, whether C-3 zoning would allow for the "best" use of the Parcel. The question, instead, in this context, is whether the Court can exclude (and understand the Town Council members to have excluded) both C-2 and OP zones as categories that would satisfy their obligation to rezone the Parcel to "Commercial."

Use of the Parcel for Office Park purposes is not implausible, especially in light of the partial rezoning to OP that was overturned in *O'Neill I*. There may be some doubt about whether OP is a commercial zone. The Comprehensive Plan (Section 9.5) includes a recommendation to "[m]aintain a sufficient amount of area in Middletown with a future land use designated as Industrial, zoned appropriately, so as to allow for the location of significant employment uses ranging from light industry to office park, within town." This suggests that OP may be an industrial classification. Similarly, in Section 9.6 under the heading "Industrial," the Comprehensive Plan recites: "Uses in this land use category should include a range of activities such as light-industrial and office-park uses."

On the other hand, both the C-3 zone and the OP zone include as permitted uses: employment centers and professional and administrative offices. Comprehensive Plan, Table 24. This suggests a substantial overlap between C-3 and OP, thereby conferring upon the OP zone commercial attributes. In short, under the Town's Comprehensive Plan and Zoning Code, it is not clear (although it may be the case) that office park is not a commercial zone and that rezoning of the Parcel to that category would not have satisfied the Town's duty under 22 *Del.C.* § 702(c).

Rezoning the Parcel to C-2 also would have satisfied any obligation to rezone it to commercial because that category obviously is a commercial zoning classification. Whether the Parcel could have been rezoned to C-2 in a manner consistent with the Comprehensive Plan is a different question. The Comprehensive Plan emphasizes (at Section 9.6) the "variety" of land uses anticipated for the west side of the Town, including the Parcel. The broad range of uses authorized in the C-2 zone could be viewed as meeting this goal of "variety." The C-2 district, of course, focuses on "historic" and "downtown" uses, but the Parcel, at least in theory, could be developed to meet those standards. That might not be a prudent use of the Parcel and might not meet the objective of large retail development in that area, but the Court cannot, in this context, exclude it without speculating. Again, the C-3 zone would appear to be substantially more appropriate, but that is a conclusion about which the Court should not speculate. In summary, the record does not support a finding that only a rezoning to C-3 would have satisfied the requirements of 22 *Del.C.* § 702(c).

also ignores the absence in the record of any affirmative indication that any member of the Town Council was, in fact, relying upon the Comprehensive Plan to reach a decision.<sup>41</sup> The only reference to the Comprehensive Plan by any member of the Town Council was in response to the comments of an attorney appearing in favor of the rezoning who suggested that the decision might be supported by reference to the Comprehensive Plan. Instead of adopting that rationale, one member of the Town Council responded by telling the attorney that the attorney was “not going to put words in my mouth.” Although this may not constitute a rejection of the Comprehensive Plan as a basis for the rezoning, it confirms that, at least for that member of Council, the Comprehensive Plan was not one of his reasons for supporting the rezoning. Moreover, if the Town Council relied upon the Comprehensive Plan to support its actions, then it should have stated that. Otherwise, the Court is left to speculate, something it cannot do, about whether or not the Council’s actions were animated by considerations of the Comprehensive Plan.<sup>42</sup> Thus, the Comprehensive Plan does not provide the Court with an adequate basis for sustaining the action of the Town Council.

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<sup>41</sup> It is not as if the proponents of the rezoning had not informed the Town of their reliance upon the recent revisions to the Comprehensive Plan: from the request that the rezoning be initiated again (PX 3) to the appearance before the Commission (PX 7) through the presentation to the Town Council (PX 8), the Comprehensive Plan was invoked.

<sup>42</sup> As observed in *BC Development Associates*, “[i]f [the zoning authority] chooses to reject a rezoning proposal because of a conflict with the [comprehensive] plan, it should cite this conflict as the basis for its action.” *BC Dev. Assocs.*, 567 A.2d at 1277.

In summary, the Court cannot find unarticulated and clear reasons in the record to sustain the rezoning. The rezoning, accordingly, must be overturned.

#### IV. CONCLUSION

The decision to set aside again the rezoning of the Parcel frustrates the reasonable investment expectations of private parties. As the Court observed in *O'Neill I*, “use of [the Parcel] for commercial purposes makes sense.”<sup>43</sup> That observation has not been altered by these proceedings.

This case, however, is not about whether rezoning the Parcel to C-3 was, as a substantive matter, a prudent land use decision. It is about process—a process which, in this State, is designed to achieve fairness and regularity in the resolution of frequently difficult land use questions. A municipality has substantial flexibility in exercising its land use authority, but that flexibility, in this context, is generally tempered by its responsibility to provide the reasoning supporting its decisions in a manner rationally tied to the record before it.<sup>44</sup> Unfortunately, that requirement was not met and, thus, proper judicial review has been thwarted. That the Court might be able to guess and to conjure up an acceptable basis for the rezoning simply does not suffice.

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<sup>43</sup> *O'Neill I*, 2006 WL 20571, at \*37.

<sup>44</sup> As *BC Development* makes clear, no “detailed statement of findings of fact and conclusions of law” is required. 567 A.2d at 1276. However, the Court notes that zoning authority members might gain assurance from providing answers to the following two questions when considering a rezoning application: (1) what supportable findings of fact are made with respect to the rezoning; and (2) how do those findings of fact relate to and further the public health, safety, and/or welfare?

Accordingly, for the foregoing reasons, summary judgment is granted to the Plaintiffs invalidating the rezoning of the Parcel to C-3.<sup>45</sup> The Defendants' cross-motion for summary judgment is denied. Counsel are requested to confer and to submit a form of order to implement this memorandum opinion.

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<sup>45</sup> The Court does not address the Plaintiffs' other arguments tendered in their challenge to the rezoning.